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No. 70-61

In the Supreme Court of the United States

OCTOBER TERM, 1971

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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I. JUSTICIABILITY AND MOOTNESS

1. The review sought by the Medical Committee and undertaken by the court below arises out of a controversy between the Medical Committee and Dow. That controversy, simply stated, was whether Dow should include the Medical Committee's proposal in a proxy statement for Dow's annual meeting.

The Commission has no machinery to adjudicate proxy disputes between private persons nor could it, as a practical matter, adjudicate such disputes and meet the rigorous time schedules encountered during the proxy season. Its interest in disputes between

shareholder proponents and management normally involves only (1) the adequacy and accuracy of the disclosures in the proxy materials, and (2) whether there appears to be a violation of the proxy rules sufficiently serious to require enforcement action by the Commission. To enable it to consider these matters, the Commission by rule has required corporate management to inform the agency as well as shareholder proponents whenever management decides to exclude a proposal from its proxy soliciting materials.[1]

The only "action" taken by the Commission in this case was to determine whether or not it would start a judicial proceeding to compel Dow to include the Medical Committee's proposal in Dow's proxy soliciting material for Dow's May 1969 annual meeting. Once the Commission had determined not to institute such an enforcement action, upon whatever grounds its members individually chose to rely, the Commission's direct interest in the matter ended and it had no view on the merits to express in the court of appeals.

The Medical Committee now urges that its petition

[1] Contrary to the Medical Committee's assertion (Br. 6, 26), the Commission has not characterized its staff consideration of shareholder proposals as "formal procedures." The Commission rule upon which the Committee apparently relies (17 CFR 202.1(b) and (c), which is miscited) is part of a section captioned "Informal and Other Procedures." It merely states that "formal procedures to be followed in Commission proceedings" are contained in "the published rules, regulations and forms" of the various statutes. 17 CFR 202.3 also is in this general section of the Commission's rules. Paragraph (a) of that provision (17 CFR 202.3(a)) specifically deals, *inter alia*, with the processing of proxy statements and refers to that as an "informal procedure."

for review sought to review only the "legal determination" (Br. 21) that it presumes the Commission made when it declined to institute any enforcement action, and that it does not seek to compel the Commission to take any action or grant it any relief.[2] But, as we discuss below (pp. 11–12), the Commission was not required to make such a conclusion, and normally would not have done so. In any event, the staff's views on the merits (Br. 17–18) provide no basis for assuming that the Commission had similar views.[3]

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[2] This represents a marked shift in the Medical Committee's position. Initially, it had requested that the Commission "take the necessary steps to compel Dow to include the proposal in its forthcoming proxy soliciting material" (App. 25).

[3] In *Sterling Drug, Inc.* v. *Federal Trade Commission*, C.A.D.C., No. 24,878, decided September 22, 1971, the court rejected the contention that memoranda containing the views of members of the Federal Trade Commission's staff were producible because they would indicate the views of the agency where the latter "did not issue an opinion giving the reasons for * * * [its] decision" (slip op. p. 11). Plaintiff had sought staff memoranda under the Freedom of Information Act, claiming that the agency's "reasons must of necessity be contained in the documents it seeks and that these documents must be disclosed 'in order to provide access to the basis for the agency decision and its rationale'" (*ibid.*). The court rejected this view, stating (per Judge Tamm, who wrote the decision below), *id.* at p. 13, that

> * * * our experience with the decision-making process leads us to believe that the material in these memoranda was probably filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from the sum of its "parts." Consequently, we doubt that an examination of the "parts" would give a very accurate picture of the decision.

[Footnote continued on next page.]

Accordingly, what the Medical Committee now seeks is a declaration unrelated to relief and to the only justiciable "controversy" that has ever existed in this matter, namely, that between the Medical Committee and Dow. Yet the Medical Committee has chosen an indirect course of review which avoids a direct confrontation with its only true adversary and is calculated to deny that adversary the protections afforded by district court procedures contemplated by the applicable statute. Section 27 of the Act gives the United States District Courts "exclusive jurisdiction of violations" of the Act and rules thereunder, and over "all suits in equity and actions at law brought to enforce any liability or duty created * * *" by the Act or rules thereunder.[4]

This case may well be a fine example of the reason why the jurisdiction of the federal courts was limited by the founders to "cases" and "controversies." For here we have important and difficult questions of cor-

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See, also, *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359 (C.A. 2), where the court pointed out:

> * * * the views of individual members of the Commission's staff are not legally germane, either individually or collectively to the actual making of final orders. They could be grossly misleading * * * because at best they are only advisory in character. * * * [T]he staff memoranda sought can in no way be construed, as being a part of the Commission's final orders.

[4] The Medical Committee apparently was aware (Br. 44, 46) that, if successful, the appellate review it invoked would be likely to induce Dow to print its resolution without affording Dow an opportunity directly to defend its position. But that result does not alter the nonadversary nature of the Medical Committee's litigation with the Commission.

porate responsibility, of general application, coming up in a highly emotional context, which, though actually irrelevant to the issue of reviewability, may color the consideration of that issue despite the best efforts to the contrary. The questions which have been briefed by the parties here, at some length, are unrelated to any relief that this Court or the court below can grant. As this Court has stated, the jurisdiction of the federal courts

> is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case.

Liberty Warehouse Co. v. *Grannis*, 273 U.S. 70, 74.[5] In a context where the core of the problem is administrative discretion on enforcement matters and the only legal judgment involved is whether to bring an enforcement suit, the agency could still decline to take enforcement action even in the face of a court of appeals determination that there had been a violation of the proxy rules.

2. The facts of this case demonstrate not only that there never was any case or controversy between the Medical Committee and the Commission but also that the controversy between the Medical Committee and

[5] See, also, *United States* v. *Los Angeles R.R.*, 273 U.S. 299; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–91.

Dow no longer exists. This appears from the following:

(1) The Medical Committee's proposal initially was submitted for Dow's May 1969 annual meeting. That meeting was held two and a half years ago, prior to the filing of the petition for review.

(2) Subsequent to the filing of the petition, Dow ceased to manufacture napalm for the government.

(3) Finally, Dow included the Medical Committee's resolution in Dow's proxy statement for its annual meeting held in May 1971.[6]

Thus, the Medical Committee has obtained everything it sought in this litigation, *i.e.*, the distribution of its proposal by Dow to enable the security holders to vote on it. All that it seeks now is a declaration that it was entitled to get what it has already received. Giving such declarations after the event is not the proper function of federal courts in our constitutional system.

Even if there is a difference of opinion as to the exact state of the law on proxy solicitation in cases of this sort, it is difficult to see how that dispute could properly be regarded as presenting a "case" or "controversy" under the applicable constitutional provision delimiting the Judicial Power. There is no relief

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[6] The Medical Committee's proposal received less than three percent of the vote of all shareholders (Br. 14) and, pursuant to Rule 14a–8(c)(4)(i), 17 CFR 240.14a–8(c)(4)(i), Dow may exclude the same or substantially the same proposal from its proxy materials for the next three calendar years. The questions whether the Medical Committee will make similar proposals after that time, and how Dow will treat them, are entirely speculative.

now sought by the Medical Committee. This case thus presents an abstract, academic dispute well-suited for extensive discussion in the law reviews; see 84 Harv. L. Rev. 700–728, 835–868. The possibility of its involving a live issue is more attenuated than ever today. Difficult and largely unprecedented problems of corporate responsibility and administrative review ought not to be answered in so abstract a setting, but ought to be decided only in the context of a specific live controversy, where the Court will have the benefit of the views of both parties to the substantive issue.

3. The slender nature of the case now before the Court is further shown by reference to an additional weakness which it carries.

Section 25(a) of the Securities Exchange Act of 1934 provides that a petition for review must be filed "within sixty days after the entry" of the Commission's order. Here the order (if there was an order) was entered on March 24, 1969 (App. 44). The petition for review was filed on May 29, 1969 (App. 3, 4), which is sixty-six days after the entry of the order.

The court below held (see App. 51–53) that the petition for review was timely filed since the Medical Committee did not receive written notice of the order until April 2, 1969 (App. 42–43), although notice by telephone was given earlier, on March 24, 1969 (App. 46). The decision that the time runs from the date of written notice rather than from the date of "entry" of the order, as specified in the statute, is at least novel, and is not applied with respect to judgments

of this Court, or with respect to the judgments reviewed by this Court.

It is of course true that this question was not raised in the petition for certiorari. It is not the sort of question which is appropriate for certiorari. But it may be jurisdictional, and as such is one which the Court normally would consider on its own motion. This may well be a further reason for not giving here an advisory opinion in a case where the relief sought has already been fully given, and over which the court below may well have had no jurisdiction.

II. Congress Did Not Intend the Courts To Administer the Proxy Rules

The ramification of questions in this case can be rather extensive and complicated, as the briefs already filed show. But the basic question may be relatively simple. It is one of separation of powers, or perhaps more accurately, of allocation of powers. In brief, we submit that the administration of the proxy regulations is a matter which Congress has committed to the administrative process without provision for or expectation of judicial review. Cf. the illuminating statement by Judge Friendly in *Langevin* v. *Chenango Court, Inc.*, 447 F. 2d 296 at 303 (C. A. 2).

There is room in our governmental structure for the administrative process. There is ample basis for the conclusion that oversight of proxies is a matter—perhaps because of its inherent complexity and uncertainty—which Congress chose to allocate for administrative handling. It remains, of course, subject to the continued review of Congress through changes in

the applicable statute, a review which Congress has never found it necessary to exercise.

It is not an essential of constitutional government that all questions must eventually be decided by courts. As then Justice Stone said: "Courts are not the only agency of government that must be assumed to have capacity to govern." *United States* v. *Butler,* 297 U.S. 1, 87 (dissenting opinion). Congress could well conclude that the handling of problems relating to proxies, with all the infinite variations of subject matter and circumstance, could best be left to administrative judgment, at least until certain issues became clearly enough identified to become appropriate for further legislative provision.

That, indeed, is what Congress did in this statute—Section 14(a) of the Securities Exchange Act of 1934. Congress laid down *no rules* with respect to proxies. Instead, it allocated the area to the Commission. Congress made it illegal to use the mails or the facilities of interstate commerce, or of an exchange, to solicit a proxy contrary to—

> such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors * * *.

The rules are the Commission's—by a complete delegation and clearly-intended allocation of Congress. In an area so amorphous, it seems reasonably clear that Congress allocated to the Commission not only the making of the rules and regulations but also the function of determining their administration and their enforcement in concrete cases. Compare *Gray* v.

Powell, 314 U.S. 402; *Dobson* v. *Commissioner,* 320 U.S. 489.

This is especially true in the present situation. Questions with respect to proxies must inherently be handled very promptly. They are numerous, and they must inevitably be considered within the Commission quite informally. If all determinations under the proxy rules are subject to review by the courts, then they must be handled differently. There must be a thorough record; there must be reasoned opinions; there must be clearer opportunity for intra-Commission review—for all of which there is no time.[7] Congress may well have thought it better for the whole matter to be handled by the administrative process, without judicial review, subject only to its own legislative review if the system did not work well, and limiting utilization of judicial action to the enforcement process. And Congress has not found it necessary to change the statute (other than to expand its application to additional companies) in more than thirty-five years.

Support for the conclusion that this is what Congress intended rests not only in its allocation of the

[7] Judge Tamm, in a subsequent case, stated in response to a suggestion that agencies should issue an opinion with every order:

> This reasoning is unrealistic when applied to the everyday world of overburdened administrative agencies. Agencies are required to issue opinions with many of their orders [footnote citing Section 5(e) of the Administrative Procedure Act], but it is completely unreasonable to suppose that every agency order can be accompanied by an opinion.

Sterling Drug, Inc. v. *Federal Trade Commission,* C.A.D.C., No. 24878, September 22, 1971, slip op. pp. 14–15, footnotes omitted.

area to the Commission by Section 14(a). It is also found in the fact that Congress made no provision for any "order" by the Commission, so as to bring the area within the court review provision of Section 25(a). Perhaps of even more importance is the provision of Section 21(e) of the Securities Exchange Act, which provides that "[w]henever it shall appear *to the Commission*" that a person is about to violate a statute or regulation—

> it may *in its discretion* bring an action in the proper district court of the United States * * *. [Italics supplied.]

Thus the matter of enforcement is specifically allocated "to the Commission" and its action is directed to be taken "in its discretion". There is no provision that this essentially administrative determination shall be made by the courts, or even that the courts shall have power to review Commission action or inaction, unless "it shall appear to the Commission" that there is about to be a violation, and the Commission "in its discretion" brings an action in the proper court. The Commission has no authority by administrative order to direct compliance. And nothing in the statute requires the Commission to seek enforcement of any provision of the statute with respect to proxies. There could hardly be a clearer allocation of the matter to administrative competence. Congress having deliberately made that choice, there is no reason why its allocation of function should not be respected.

There are many reasons why the Commission might conclude that it would take "no action" in a particular

matter.[8] Not every case taken to a court will be decided by that court, as is evident in this Court's certiorari jurisdiction. Not every case can be taken to court, even though there may be basis for a court decision or review—as is evident in the function of the Solicitor General to decide what cases to appeal, and what cases to bring to this Court on petition for certiorari. These are discretionary functions, and it would be hard to give a consistently reasoned justification for every decision—and there would not be time to do it if for some reason it was thought that it had to be done.

The function of the Commission in this case was likewise discretionary. It was not required to take any action at all on the Medical Committee's request—even of "no action." Whether it sought enforcement of the rules was specifically allocated by Congress for determination by the Commission "in its discretion." To make this the subject of judicial review under Section 25(a) is to reallocate to the courts an area which Congress specifically chose to be handled by the administrative process—without seeking to preclude anyone from pursuing his rights in the proper forum, the district courts.

Even if, as the Medical Committee argues (Br. 25), the question whether the proxy rules required Dow to include the Committee's proposal presents "an isolatable determination of law," the question whether the Commission properly declined to take enforcement action cannot be broken down for purposes of judicial review into separate and unrelated elements of law and policy.

[8] See the Commission's main brief, p. 13.

The Commission's ultimate enforcement judgment necessarily reflected a fusion of all the relevant considerations it took into account. It would ignore the realities of the actual functioning of the administrative process to conclude that, although the agency's enforcement determination is not reviewable, certain of the legal theories that that determination may have involved are nevertheless subject to direct judicial scrutiny.

All of this is nicely exemplified by the present case. The court of appeals was not in a position to vindicate any right of the Medical Committee. That can be done only in a district court in an action to enforce compliance with the proxy rules. The court of appeals cannot order the Commission to seek enforcement; there is no provision for such a mandatory order in Section 25(a) and the decision to seek enforcement has been expressly committed by Congress to the discretion of the Commission. All that the court of appeals can do in this case is to express its view of the law applicable to a controversy between the Medical Committee and Dow that has not been presented by those parties for the court's consideration. And the decision of the court of appeals will not be binding on the district court if the Medical Committee seeks to enforce there its rights as a shareholder—if for no other reason than that Dow is not a party before the court of appeals and is not in any way bound by its decision.

Thus the present procedural posture of the case shows clearly enough that the only end to which it can come is an advisory opinion by the court below

on a matter as to which that court can require no action to be taken, and which is one that Congress has expressly allocated, for good reason, for handling by the administrative process, and not by the courts.[9]

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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[9] The Medical Committee relies upon *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, as sustaining reviewability. In that case, however, the government itself urged that the agency action that was challenged—a Commission ruling on the application of the fairness doctrine made in a letter to a licensee—was reviewable as a declaratory ruling which the agency's own rules authorized the Commission to issue. 395 U.S. at 372–373, n. 3. In the present case, on the other hand, the Commission consistently has taken the position that its action is not reviewable, and the statute does not authorize the issuance of any "orders" in proxy matters.

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